Zango Inc v. PC Tools Pty Ltd Doc. 36

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC. ,

Plaintiff,

v.

PC TOOLS PTY, LTD.,

Defendant.

Case No. 07-CV-00797-JCC

SECOND DECLARATION OF NEILL WHITEHEAD IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE

I, Neill Whitehead, being first duly sworn, state as follows:

1. I am the Chief Financial Officer for PC Tools Research Pty Ltd, which owns PC Tools Pty Ltd as a wholly-owned subsidiary. PC Tools Research Pty Ltd is a privately-held corporation organized under the laws of the country of Australia, with its principal place of business in Sydney, Australia. I have personal knowledge of the matters stated in this Declaration. The source of my information is my own personal knowledge and information provided to me by other representatives of PC Tools Research Pty Ltd.

2. I submit this Declaration to further explain PC Tools' business activity in Washington and to respond to Zango's affidavits speculating as to PC Tools' business activity in Washington.

3. PC Tools has a limited keyword advertising contract with Microsoft to use MSN.com to provide a link to PC Tools' website when a user of MSN.com enters certain search

HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200, Denver, CO 80202
Telephone (303) 295-8000

Dockets.Justia.com

terms (such as "spyware" or "malware") into MSN.com's search engine. If the user clicks on the link, the user is then taken to PC Tools' website.

4. Zango's calculation as to the amount of PC Tools' sales to Washington residents assumes that every download of Spyware Doctor is a paid download of Spyware Doctor. That is incorrect. A very large number of the total downloads of Spyware Doctor are free or trial versions. I have examined the best available data that can be used to extrapolate and estimate the amount of annual online sales and renewal revenue PC Tools derives from Washington and, based on a three-month sampling, concluded that PC Tools receives approximately $550,000 in annual revenue from online purchases made by Washington residents.[1]

5. A Washington customer buying Spyware Doctor from PC Tools' website conducts the transaction through a third party processor called Digital River GmbH, which is a German company based in Cologne, Germany. PC Tools has an electronic sales agreement with Digital River.

6. A Washington customer buying Spyware Doctor agrees to an End User License Agreement (commonly referred to as a "EULA") in which the customer agrees that the exclusive venue and applicable law is Australia (for customers in the Oceanic Region) or Ireland (for customers in all other regions, including the United States and the State of Washington). PC Tools' affiliate covering online sales in the U.S. territory is located in Ireland.

7. PC Tools does not sell directly to retail stores in the United States. PC Tools contracts with an independent third-party contractor, Encore Software Inc., that manufactures and distributes Spyware Doctor. Encore is a wholly-owned subsidiary of a Minnesota corporation with its principal place of business in Los Angeles, California. Any copies of Spyware Doctor distributed into Washington retail stores are done so by Encore and because

[1] In examining the data, my previous testimony that "only 0.07% of the total downloads were from Washington state" may be understated. This does not change the ultimate conclusion, however, as to PC Tools' estimated annual revenue from Washington residents.

HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200, Denver, CO 80202
Telephone (303) 295-8000

Encore has decided to do so. PC Tools does not have a contract with Fry's Electronics, Office Depot, or any other retailer in Washington.

8. Spyware Doctor holds less than a 5% share of the worldwide anti-spyware market.

9. Encore also made the decision to distribute Spyware Doctor via Amazon.com and Zones.com. Because Encore is an independent contractor, PC Tools does not have the ability to control Encore's decisions as to distribution, and in fact does not exercise control over such decisions. The fact that Encore performs such on-line distribution is shown by the Amazon.com

[SPACE INTENTIONALLY LEFT BLANK]

HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200, Denver, CO 80202
Telephone (303) 295-8000

screen shot attached by Zango as Exhibit 1 to the Rosenberger Declaration and by the Zones.com screen shot attached to this Declaration as Exhibit A. PC Tools does not have a contract with Zones.com, Amazon.com, or any other on-line retailer based in Washington.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Neill Whitehead

Dated: June 22, 2007

HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200, Denver, CO 80202
Telephone (303) 295-8000

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

- **Michael Rosenberger**
  mrosenberger@gordontilden.com,chudson@gordontilden.com, jbukowski@gordontilden.com

- **Jeffrey I Tilden**
  jtilden@gordontilden.com,eevans@gordontilden.com, jbukowski@gordontilden.com

- **J. Ronald Sim**
  jrsim@stoel.com, jalorton@stoel.com, SEA_DOCKET@stoel.com

- **Maren R. Norton**
  mrnorton@stoel.com, jswaldschmidt@stoel.com, SEA_docket@stoel.com

DATED: June 22, 2007 at Denver, Colorado.

s/Tarek F.M Saad
Tarek F.M. Saad, Colo.Atty. Reg. #26242
Conor F.Farley, Colo. Atty. Reg. #31622
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, Colorado 80202
Telephone: 303-295-8000
Fax: 303-295-8261
tfsaad@hollandhart.com
cfarley@hollandhart.com

J. Ronald Sim, WSBA No. 4888
Maren R. Norton, WSBA No. 35435
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101-3197
Telephone: 206-624-0900
Fax: 206-386-7500
jrsim@stoel.com
mnorton@stoel.com

ATTORNEYS FOR DEFENDANT PC TOOLS

3728191_1.DOC

800-408-9

ZONES

Connecting Businesses & Technology

Zones Stores

- Small Business
- Corp Business
- Mac Zone
- Creative Pro
- Public Sector
- Clearance

Solutions Center

- Networking
- Security
- Storage

Resources

- Email Signup
- Webinars
- License Tracker
- ZonesConnect
- Customer Service
- Services

Express Servers
from IBM
Get the most for your business
Click to Learn More

Graphics Products
Gaming
Workstations
Graphics
Multimedia

Brands | **Systems** | **Hardware** | **Software** | **Networking**

Refine Your Search

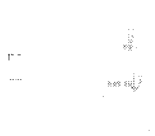
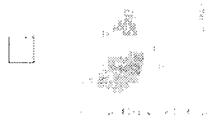
By Manufacturer View All Manufacturers **By Category**

By Platform View by platform **By Price Range**

Refine within these results: **Show products with**

Results for PC Tools -- (2 products found)

Images: on | off

Compare	Description
	Encore Software Inc. - PC TOOLS SPYWARE DOCTOR 2007 SBC PC TOOLS **Mfr #:** 10991
	Intermec - DEX TOOLS DOTNET TOOLS FOR NET DEVL INCL ON **Mfr #:** 235-108-001

Compare

Select up to 5 products for a full comparison of features and specs.

Zones - Lowering the Cost of IT Procurement
Copyright © 1996 - 2007 Zones, Inc.

About Us | Investor Relations | Terms and C

EXHIBIT A